

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MARK CREECH,

Civil No. 09-6275-AA
OPINION AND ORDER

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

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3 AIKEN, Chief Judge:

4 Claimant, Mark Creech, brings this action pursuant to the
5 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
6 1383(c)(3), to obtain judicial review of a final decision of the
7 Commissioner denying his application for Supplemental Security
8 Income (SSI) disability benefits under Title XVI of the Act. For
9 the reasons set forth below, the Commissioner's decision is
10 affirmed and this case is dismissed.

11 **PROCEDURAL BACKGROUND**

12 Plaintiff was previously denied benefits in January 2004.
13 Tr. 8. Plaintiff then filed a new application for SSI in
14 February 2006. Plaintiff alleged disability beginning June 1998
15 due to back and neck pain and carpal tunnel. Tr. 134. The
16 Commissioner denied plaintiff's application initially and on
17 reconsideration. An Administrative Law Judge (ALJ) held hearings
18 on March 18, 2008, and October 28, 2008. Tr. 27-50, 272-312.
19 Following the March 2008 hearing, the ALJ continued the matter in
20 order to obtain testimony from a vocational expert (VE). Id. On
21 November 28, 2008, the ALJ issued a decision finding plaintiff
22 not disabled at step five finding he could perform work existing
23 in significant numbers in the national economy. Tr. 53-65. The
24 Appeals Council denied plaintiff's request for review, making the
25 ALJ's decision the Commissioner's final decision. Tr. 1-4. The
26 relevant period under review is from March 2006, to November 28,
27 2008.
28

1 **STATEMENT OF THE FACTS**

2 Plaintiff was 47 years old at the time of his last
3 disability hearing. He completed eighth grade and then dropped
4 out of school at 15 years old. He had previous work as a
5 commercial fisher, he completed an automotive training course,
6 and worked part-time as a caregiver for his blind mother.
7 Plaintiff also admitted manufacturing methamphetamine as a source
8 of income. Tr. 250-51. He admitted methamphetamine use since
9 1996 including use within the past year, but denies addiction.
10 Id.

11 **STANDARD OF REVIEW**

12 This court must affirm the Secretary's decision if it is
13 based on proper legal standards and the findings are supported by
14 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
15 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
16 mere scintilla. It means such relevant evidence as a reasonable
17 mind might accept as adequate to support a conclusion."
18 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
19 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
20 The court must weigh "both the evidence that supports and
21 detracts from the Secretary's conclusion." Martinez v. Heckler,
22 807 F.2d 771, 772 (9th Cir. 1986).

23 The initial burden of proof rests upon the claimant to
24 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
25 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
26 an "inability to engage in any substantial gainful activity by
27 reason of any medically determinable physical or mental
28 impairment which can be expected . . . to last for a continuous

1 period of not less than 12 months. . . ." 42 U.S.C. §
2 423(d)(1)(A).

3 The Secretary has established a five-step sequential
4 process for determining whether a person is disabled. Bowen v.
5 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520,
6 416.920. First the Secretary determines whether a claimant is
7 engaged in "substantial gainful activity." If so, the claimant
8 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§
9 404.1520(b), 416.920(b).

10 In step two the Secretary determines whether the claimant
11 has a "medically severe impairment or combination of
12 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
13 §§ 404.1520(c), 416.920(c). If not, the claimant is not
14 disabled.

15 In step three the Secretary determines whether the
16 impairment meets or equals "one of a number of listed impairments
17 that the Secretary acknowledges are so severe as to preclude
18 substantial gainful activity." Id.; see 20 C.F.R. §§
19 404.1520(d), 416.920(d). If so, the claimant is conclusively
20 presumed disabled; if not, the Secretary proceeds to step four.
21 Yuckert, 482 U.S. at 141.

22 In step four the Secretary determines whether the claimant
23 can still perform "past relevant work." 20 C.F.R. §§
24 404.1520(e), 416.920(e). If the claimant can work, she is not
25 disabled. If she cannot perform past relevant work, the burden
26 shifts to the Secretary. In step five, the Secretary must
27 establish that the claimant can perform other work. Yuckert, 482
28 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g).

1 If the Secretary meets this burden and proves that the claimant
2 is able to perform other work which exists in the national
3 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

4 DISCUSSION

5 1. The ALJ's Findings

6 At step one, the ALJ found that plaintiff did not perform
7 substantial gainful activity after his alleged disability onset
8 date. Tr. 58. At step two, the ALJ found that plaintiff's
9 severe impairments were: status post neck surgery; alcohol abuse;
10 learning disability, not otherwise specified. Tr. 58. At step
11 three the ALJ found that plaintiff's impairments did not meet or
12 equal the requirements of a listed impairment. The ALJ
13 determined that plaintiff's residual functional capacity (RFC)
14 was the performance of medium work. Tr. 59. Plaintiff was also
15 limited by his inability to follow written instructions. Id. At
16 step four, the ALJ found that plaintiff could not perform his
17 past relevant work. Tr. 63. Finally, at step five, the ALJ
18 found that based on vocational testimony, plaintiff was not
19 disabled because there were jobs that existed in significant
20 numbers in the national economy, including work as a hospital
21 cleaner, kitchen helper, or cleaner. Tr. 64, 27-50.

22 2. Plaintiff's Allegations of Error

23 A. Plaintiff's Credibility

24 Plaintiff asserts that the ALJ failed to articulate clear
25 and convincing reasons for finding his subjective complaints less
26 than fully credible. Absent evidence of malingering, an ALJ must
27 give clear and convincing reasons to reject a plaintiff's
28 medically-related symptoms. Carmickle v. Comm'r, Soc. Sec.

1 Admin., 533 F.3d 1155, 1162 (9th Cir. 2008). Those reasons
2 include conflicting medical evidence, effective medical
3 treatment, daily activities inconsistent with the alleged
4 symptoms, medical noncompliance, or poor work history.
5 Lingenfelter v. Astrue, 504 F.3d 1028, 1040 (9th Cir. 2007).

6 The ALJ found that plaintiff's medically determinable
7 impairments could reasonably be expected to produce some of the
8 alleged symptoms; however, plaintiff's statements concerning the
9 intensity, persistence and limiting effects of these symptoms
10 were not credible to the extent they were inconsistent with the
11 RFC assessment. The ALJ found that plaintiff's activities of
12 daily living did not support his allegations of total disability.
13 Tr. 60. Plaintiff told Dr. Gregor that he manages his activities
14 of daily living including cooking, laundry, dishes, paying his
15 cell phone bill, and using the computer. Tr. 252. He also wakes
16 and feeds his mother who is ill. Id. Daily activities that are
17 inconsistent with alleged symptoms are a relevant credibility
18 consideration. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir.
19 2001).

20 Further, Dr. Gregor completed a psycho diagnostic interview
21 on April 16, 2008. Tr. 248-250. Plaintiff told Dr. Gregor of
22 his history of drug and alcohol abuse. Dr. Gregor noted that
23 although plaintiff's drinking did not necessarily interfere with
24 work, his reported alcohol abuse was inconsistent with
25 plaintiff's previous reports that he did not drink. Id.
26 Plaintiff also revealed that he had a medical marijuana card and
27 uses marijuana once per week at night to aid his sleep. Id. The
28 ALJ noted that at the hearing plaintiff stated that although he

1 had prescriptions for pain killers and other drugs, he could not
2 afford to have them filled. Tr. 62.

3 The ALJ also noted Dr. Nolan's report that plaintiff's
4 father reported that plaintiff was out "getting a load of hay."
5 Tr. 195-97. The ALJ found that the labor in transporting a load
6 of hay was at odds with plaintiff's alleged capabilities, noting
7 that a typical hay bale weighs approximately 80 pounds.

8 The ALJ articulated clear and convincing reasons for
9 rejecting some of plaintiff's testimony concerning the degree of
10 severity of his symptoms. Moreover, the ALJ fashioned a RFC
11 finding that accounted for plaintiff's credible limitations. Tr.
12 59. Finally, the ALJ provided clear and convincing reasons to
13 support the credibility finding. Tr. 59-62.

14 B. Residual Functional Capacity Assessment

15 Plaintiff next argues that the ALJ's RFC assessment was
16 improper in that it failed to account for all of plaintiff's
17 limitations. I disagree and find that the ALJ's RFC assessment
18 properly accounted for all of plaintiff's limitations that the
19 ALJ found credible and were supported by the medical evidence in
20 the record. Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir.
21 2001).

22 Plaintiff's RFC is the most he can do considering his
23 impairments and limitations. SSR 96-8p. The issue of plaintiff's
24 RFC is not a medical issue, but an administrative finding that is
25 dispositive of the case. The final responsibility for deciding
26 such issues is reserved to the Commissioner, and by delegation of
27 authority, to the ALJ. SSR 96-5p. Regardless, however, when
28 assessing plaintiff's RFC, the ALJ must consider the entire

1 record and explain the weight given to the medical evidence and
2 testimony. Id. The ALJ found that plaintiff could perform
3 medium work limited by his inability to follow written
4 instructions. Tr. 59. The ALJ's RFC finding is correct because
5 it "took into account those limitations for which there was
6 support [in the record] [and] did not depend on [plaintiff's]
7 subjective complaints that lacked credibility." Bayliss v.
8 Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005).

9 Finally, substantial evidence supports the ALJ's reliance
10 on the vocational expert's testimony that plaintiff could perform
11 other work, including a hospital cleaner, kitchen helper, or
12 cleaner and that those jobs existed in significant numbers in the
13 national economy. Tr. 64, 38-42. The ALJ properly included all
14 supported limitations in hypothetical questions to the vocational
15 expert. Tr. 530-51.

16 CONCLUSION

17 The Commissioner's decision is based on substantial
18 evidence, and is therefore, affirmed. This case is dismissed.
19 IT IS SO ORDERED.

20 Dated this 29 day of September 2010.

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24 Ann Aiken
25 United States District Judge
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